UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Virginia K. DeMarchi, Judge

TAYLOR, et al., Plaintiffs, vs. GOOGLE, LLC, Defendant.	No. C 20-07956-VKD

San Jose, California
Tuesday, March 29, 2022

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THE CLERK: 20CV7956, Taylor, et al. versus Google, LLC, on for motion to dismiss.

Counsel, please state your appearances beginning with the Plaintiffs.

MR. WALLENSTEIN (via Zoom): Good morning, your Honor. Marc Wallenstein for the Plaintiffs.

THE COURT: Good morning.

MR. SOMVICHIAN (via Zoom): Good morning, your Honor. Whitty Somvichian with Cooley, representing Google today.

THE COURT: Okay. Good morning.

So, we are here on Google's motion to dismiss the first amended complaint. Thank you again for your very excellent briefing, both sides. It's very helpful.

I feel that I may be at risk of asking you some of the same questions we talked about a few months ago, but I did want to address a couple of points, and that -- let me start with Google since it is Google's motion.

We now have the formulation cellular data instead of cellular data allowance, and I -- I take Google's point that from Google's perspective, really nothing much has changed. Cellular data and cellular data allowance are essentially

the same.

The parties' arguments this time around, as before, analogizing the -- the -- the thing at issue here, cellular data to electricity and the provision of electricity and how do we think about electricity in terms of conversion are useful and continue to be somewhat challenging I think to address, but I wanted to pose to Google a question about possibly a different analogy, and that is I have been thinking about cellular data and cellular data allowance, those concepts, in the context of phone service, so, telecommunications and, in particular, the version of telephone service that is the plain old telephone system, meaning there's a subscriber who pays for telephone service and you get it via a wire, so, not digital, not any of the newfangled anything, but plain old telephone service.

So, if someone -- you have a subscriber with telephone service and someone uses that subscriber's telephone line to make a call and the subscriber is charged for that call, is that conversion? And if not, why not?

And I'm sorry for springing that analogy on you right out of the box, but it struck me as possibly a more closely connected circumstance.

MR. SOMVICHIAN: Yes. So, your Honor, that would not be conversion for the same reasons that the claims here don't support a conversion claim because in that analogy,

the -- the dispute still involves a contractual right to a service. The -- the -- the individual's rights in that service are defined by a contract. They don't exist independently of the contract. They may be burdened -- you know, they -- let's say their charges go up because somebody's been tapping their phone line or just coming in, you know, and using their -- their phone. There may be a claim, some other type of claim, but not a conversion claim that depends on a cognizable form of personal property. And in that circumstance and in our circumstance you get to the same result because what you're dealing with is a contractual right to a service which you've correctly found before does not support a conversion claim under California law.

THE COURT: And if we were instead talking about water, which is easier than electricity or telephone service, and someone was diverting water from my water supply system from the city to their own property, would that not be conversion of the water?

MR. SOMVICHIAN: That could potentially -- that -- that presents a much different situation because the water exists as property, as a tangible thing, item that can -- separately from the contractual rights to it. So, you can have a situation, certainly, where there's existing property and there's a contractual right to that property in varying

amounts and in different -- subject to various terms, and that -- and that's really the distinction here. It's -- it's the fact that the only thing that the Plaintiffs are asserting an interference with is their contractual right. There's not a separate underlying property as in the water example.

THE COURT: So -- so, here's -- here's where I think there's some difficulty, which is I'm pretty sure that at least two appellate courts in California Terrace and the in the San Joaquin cases, one in 1905 and one in 1929, did find that electricity is personal property. That was -- those were in the context of breach of contract cases, not conversion cases, but very specifically did say they are personal property.

Now, perhaps in the context of conversion, some other California court would reconsider that. But -- but if we assume for the moment that electricity, like water, is personal property, then we're kind of back to the same discussion that we had before, which is you can't simply say, Well, electricity is not personal property or -- you know, as distinct from water, which is personal property.

Do you see what I'm saying? Or the telephone service -- I mean, I guess the -- the compelling -- for me, the compelling distinction was the one that Google made last time, which was if we're going to talk about analogy, the

proper analogy in the context of electricity is that you have wires that are the means for delivering the electricity, and they -- and that's distinct from electricity itself.

And to compare that to what's at issue here in this case, the means of delivery, information or data files are the radio signals or whatever, the cellular data in the form of radio signals measured in bytes, and the actual thing that's analogous to the electricity are the data files or information that are actually sent to the consumer.

So, distinguishing the means and measurement of transmission of whatever it is from the actual thing that is transmitted, that made some sense to me. But -- but I still find myself troubled by -- it doesn't really -- it's not a perfect analogy. And, so, I'm just -- I find myself rethinking this again, and I appreciate your discussion about the telecommunications analogy, but it's somewhat dissatisfying to say, Well, it doesn't exist but for the contract. It doesn't seem to really work. Electricity does exist, like water. So, it's not simply a creation of contract.

MR. SOMVICHIAN: Well, your Honor, I think one question also is what -- what is new in the complaint.

THE COURT: Yeah, that's a good point. I understand, but I could have been wrong. That's the thing.

I could have been wrong last time, and, so, I'm prepared to accept the fact that I could have been wrong. And, so, I appreciate nothing's new in the complaint. I -- you know, I take that point, there's not much that's new. But I am continuing to -- to wonder about the -- the analogy.

So, I'm sorry to have cut you off.

MR. SOMVICHIAN: And, to that point, your Honor, there's nothing new that changes the conclusion that you reached with respect to the specific element of a property interest, the exclusivity requirement that it not only be something that could be precisely defined but something that somebody can actually own and possess to the exclusion of others in a -- in a way that's exclusive. And, again, there is nothing in the facts here that would support that element. Nothing has changed. We're still talking about the means of transmission, that the bytes of data, they've switched from cellular data allowance, because that's clearly a creature of contract, to saying, Well, it's just the cellular data itself. But that's what they argued before, your Honor, that they were focused on the bytes of data. And you're right that that is the means of transmission. That's not something that any Plaintiff owns or possesses to the exclusion of others. It's just the way that they access the service that they have a right to access via their contractual terms. So, that is the same.

That is no different than before and leads to the same conclusion that because you don't -- you can't dispossess somebody from a particular byte of data, you don't own any particular byte of data, you just get to access a network to -- to receive a service, and that's not a property interest.

THE COURT: It does seem to me that -- and I'm -- I think this -- what I'm about to say favors Google's position rather than -- than the Plaintiffs' position, but it seems to me that a particular cell phone user doesn't actually possess, exclusively or otherwise, any -- any increment of data, whether you conceive of it as a right or, you know, a quantum of energy that carries data -- carries the data file. But you don't actually possess that until you've actually sent or received a transmission.

So -- so, the concept of owning something before you've sent or received anything, even if I, you know, am most generous to the Plaintiffs' conception of this, doesn't seem helpful to the Plaintiff, because in the absence of doing that, there is nothing that they own or possess exclusively.

So, I mean, I think this is consistent with Google's theory, and I will be asking MR. Wallenstein about it as well. But I wonder what your -- your reaction to that way of thinking is. Is that a correct way of thinking about it, that if there is some possession, it doesn't happen until there's actually a transmission or reception with that

particular cellular telephone?

MR. SOMVICHIAN: Yes. The -- the property interest that they're trying to assert as such, to your point, your Honor, it seems very awkward to say that that only springs into existence at the moment of the data transfer itself. And that kind of underscores why the -- the theory doesn't fit within the normal framework of -- of personal property, even extended to these types of intangible forms of -- of property.

And, again, that moment of transmission when their data file gets transmitted or they receive a security update from Google or some -- or some other lying -- other underlying data file is -- is transmitted, the -- the means of transmission, again, only -- they -- they access that network at that moment and use those particular bytes of cellular data to transmit that data in that moment, and there's nothing that exists prior to that. And there's no sense in which you could say I -- I -- I own this increment of the network that I might use at some future point. And I think you're right that that underscores the analogy to other forms of intangible property just doesn't fit here because what they're really doing is just exercising their contractual rights to access the service at a particular moment in time.

THE COURT: Okay. Yeah. All right. So -- so,

let me -- let me turn to the question of quantum meruit, which is now formulated by the Plaintiffs in a different way. They say, Okay. Well, it's not like our conversion claim because to the extent our conversion claim relies on property, our quantum meruit claim relies on rights created by contract.

So, I would -- I would like to -- I mean, I would like to let you argue whatever you would like to argue on the common count issue, but I -- I feel that there is some merit to the argument as formulated now, that you can have a quantum meruit claim even when it seeks the same recovery, as long as you're not advocating a double recovery, you're not obtaining a double recovery, you can have a different legal theory for seeking a recovery that's based on quantum meruit, whether it's a common count or not, that is distinct from the conversion claim.

So, if I find there's no conversion claim that could be pled here, I'm not persuaded that that necessarily means the quantum meruit claim as currently formulated has to fail because last time around, the quantum meruit claim was really formulated as -- based on exactly the same premises, legal and factual, as the conversion claim. And, so, I -- it was not very problematic for the Court to say, Well, you can't possibly do that.

So -- so, I think there are -- there are problems,

which I will explore with Mr. Wallenstein, about the elements of the quantum meruit claim and whether that's satisfied, but I'd like to -- to make sure I'm not, you know, misunderstanding the arguments that Google has made about how as a common count you can't have it. That doesn't seem to be supported by the case law.

MR. SOMVICHIAN: Your Honor, so, there's no dispute that quantum meruit, because of the historical development of the law, is a common count. There's no controversy around the rule that you applied before that a common count, when pled in a way that relies on the same facts and seeks the same recovery as an independent claim, has to rise and fall with -- with that other cause of action. That's established law in the McBride, McAfee, other cases.

So, I don't think it's correct that, when pled as -- in a way that the Plaintiffs have -- and they're the master of their complaint, your Honor. They could have -- they could have shown you that it -- it derives from a different set of facts or they could have pursued a different calculation of recovery, but they didn't do those things. The complaint still relies on the same facts with respect to all of the -- with respect to both the conversion claim and quantum merit. All of the --

THE COURT: So -- so, I'm sorry to interrupt, but

let's say that they had, after my first order, decided that they weren't going to pursue the conversion claim at all and they dropped it and I had only a complaint that said we're entitled to recovery in quantum meruit. I don't see how you could possibly make the argument that you're making now. Right? So, if I dismiss the conversion claim because it can't be sustained under the law of conversion and they can't meet the elements, then how could that possibly be a just result to say, "And you can't have the quantum meruit claim either because it's like the conversion claim which I'm dismissing," when they are specifically now saying it's a different legal theory? It's not simply you can't actually meet the merits of a claim based on personal property; so here's a common count based on personal property. That's -- I'm not sure that's wise.

MR. SOMVICHIAN: Let me just touch on that briefly, your Honor.

THE COURT: Okay. Good.

MR. SOMVICHIAN: Even -- even if you conceive of the -- even in your situation where we just -- we just evaluate the quantum meruit claim as if it were standalone, let's say they had just pled that, it still fails; and we can come back to that. I'd like to come back to that. But --

THE COURT: Okay.

MR. SOMVICHIAN: -- with respect to the issue of whether they rise or fall together, it -- it does depend, your Honor, on whether they have p led a situation in which their quantum meruit theory relies on the same facts and seeks the same recovery.

So, you could -- you could have a situation where, okay, we have a breach of contract claim and a quantum meruit claim, and those don't have to rise and fall together. Why? Because they seek different recoveries by -- by definition. A breach of contract claim seeks contract damages, expectations damages, benefit of the bargain that could include lost profits, et cetera.

The quantum meruit claim in that situation is a proper alternative claim that could stand on its own because, even if -- even let's say it relies on all of the same fact, because it seeks a different recovery, the law says you don't get to try to enforce the contract in full and get everything that you might have gotten from the contract. But we're going to step in; and if the breach of contract claim fails because of some formality or requirement under contract law, we're not going to allow a plaintiff to be harmed if they've performed services expecting compensation and you get to at least get the value of the services you've provided. That's a different remedy, and that's why in that situation you can have a claim like breach of contract and a

quantum meruit theory that stand separately and don't have to rise or fall together.

That's not how they pled it here, your Honor.

THE COURT: Right, and but --

MR. SOMVICHIAN: They pled --

THE COURT: But it does seem to me that if you were -- it's -- maybe coincidence is not the right word, but you could have two different causes of action that had, you know, theoretically different theories of recovery but end up with the same measure of damages.

So, in other words, you could have a breach of contract claim that is identical in terms of the measure of damages alleged under that contract with a quantum meruit theory of recovery.

So, even though you might be able to get and could argue the framework is different for contract damages versus quantum meruit unjust enrichment kind of damages, they could be the same; and perhaps it's coincidence.

So, here, if what you're suggesting is that, Well, the theory of recovery, the measure of damages is the same, which is what's the value of this data that was used, right, these -- however we're going to formulate it, the cellular data that was used without permission, it just so happens that the -- at present, in the pleadings stage, the Plaintiffs are relying on the same measure of damages?

MR. SOMVICHIAN: Yeah. Well --

THE COURT: It would have to be that way.

MR. SOMVICHIAN: But that -- that's not how they pled the claim, your Honor. It's not -- it's not a circumstance where they've pled two theories that have two different measures of recovery and they just happen to converge given the particular facts of the case.

They've pled two claims specifically to get the same remedy, the value of the cellular data allowance. But I -- I don't want to dwell on this. I think --

THE COURT: Okay. No, I understand. I understand your point. That's helpful.

MR. SOMVICHIAN: We do think your prior order was correct, that quantum meruit is a common count. The rule that you applied before is well established and still applies. But, even if you, your Honor, were to find that, okay, I want to -- I want to consider the quantum meruit claim as a -- as a standalone without regard to what happens with conversion, the claim still fails because the basic premise of quantum -- quantum meruit is an expectation of compensation. That's why the law steps in to protect a plaintiff, so that in the situation that we were talking about before where a plaintiff may not be able to enforce a contract in full but because they detrimentally relied -- they performed services based on an expectation of

compensation and they've expended the time, effort, resources, money to provide the service, the law steps in to provide that protection so that you can get at least the value of the services that you provided.

The premise of all of that is the expectation of a compensation. That's reflected in all of the case law that describes the elements of quantum meruit in a standalone sense, and that's what is not pled here.

THE COURT: Yeah. I -- I find that a pretty persuasive argument I have to say, that even if I were to say, Okay, quantum meruit can exist as an independent claim from the conversion claim, the elements aren't there. I've looked at the case law that you all cited on that, and I saw the reply. I'm going to give Mr. Wallenstein an opportunity to respond to the reply on that point, but I can find that t hat's -- at this point I find that a pretty persuasive argument. So, I have mostly questions for the Plaintiff on that point.

Before I turn to the Plaintiff, is there anything else that you'd like to highlight for me or argue on Google's behalf?

MR. SOMVICHIAN: Just very quickly, your Honor, and just to build on the point on -- on quantum meruit, again, the -- the reason we're running into all of these difficulties of -- of how to conceive of it and whether the

elements fit is because it -- it -- the circumstances here just don't fit within the framework at all of quantum meruit. We talked about the elements before and the expectation of compensation.

In the typical circumstance, you have a -- you have a plaintiff who performed services and they're out some amount of time or effort or resources. The Plaintiffs did nothing here. They didn't provide the service that their -- their network carriers did. They weren't harmed in some sense where the -- the law needs to step in in an equitable sense to restore them to some prior position because they detrimentally relied.

And, so, we -- we focused on one element of -- of the common count in terms of the expectation. But, really, when you think about it as a whole, you know, the circumstances here really don't fit any of the typical factors and circumstances of a quantum meruit claim. So, I just want to underscore that.

THE COURT: Okay. Okay. That's -- that's helpful, and I will give you an opportunity to respond after I've asked Mr. Wallenstein --

MR. SOMVICHIAN: Thank you.

THE COURT: -- some questions. Thank you.

All right. Mr. Wallenstein, let me start with kind of -- the conversion claim and -- and the -- the question of

what exactly is cellular data.

So, I looked very carefully at the first amended complaint, and paragraph 11 I interpret as the Plaintiffs' effort to define for me what they mean by cellular data. So, paragraph 11 includes the statement that cellular data describes the transmission of information over a cellular network charged against consumers' cellular data plans, and it's also said in paragraph 11 that cellular data does not refer to the actual data files or information that's transmitted.

The difficulty I have with that is that it's not really a definition to say cellular data describes because it seems to me like cellular data is being used in the first amended complaint as very similar, if not identical to, the phrase "cellular data allowance" in the original complaint. And it can mean or does mean both the means of transmission of this information over the cellular network and the measurement of that use of the cellular network, which just sort of brings us back to where we were -- where I was in -- in the decision I made on the -- the initial complaint.

So, if that's the case, it does seem to me that your analogy to -- or the Plaintiffs' analogy to electricity or water or other utilities doesn't really work. So, I'd like for you to really drill down on what is cellular data as used in the first amended complaint.

MR. WALLENSTEIN: Thank you, your Honor. And we appreciate the opportunity to replead the complaint and to defend it again today.

You mentioned the -- the analogy that Google provided you last time around that you found very compelling, distinguishing between the means of transmission, the measure of the information and the underlying information transmission. I found that very helpful too, but it's missing two things, and it's missing two things that we have pled that are new allegations in this complaint.

What's different in this complain is set forth in paragraphs 70 to 74, mostly in 72 and 73. What's alleged there is that the energy that's expended when transmitting information over the cellular network, it's expended forever. It uses up electricity. And just like electricity can be capable of exclusive possession and control, because electricity is expended, the cellular data that's moved is capable of exclusive possession and control. So, that is one additional fact and one additional -- you'd have to add that as a fourth thing to the three things that -- that Google identified between the means, the measure, and the underlying information. There's also the energy required to transmit the information.

In addition to that, we introduced the concept of the finiteness of the network. The same cellular data cannot

occupy the same space in the network at the same time. So --

THE COURT: I don't see how that -- that is helpful to me, though. I mean, I -- I appreciate that there's only limited -- there's limited bandwidth in terms of whatever frequency this is being transmitted on, and there's a possibility that, you know, it -- and I also get the concept technically -- at least I think I do -- that once someone sends or transmits to a particular user's cell phone, it's kind of like a channel, right. So, it's a channel to that cell phone, and that data occupies some -- so that data file or information occupies some measure of cellular data, whether it's a portion of a signal or however it's incremented.

So, I -- so, I understand that, but -- but here's what I'm still having difficulty with. I'm sorry to bring you back to paragraph 11, not your paragraph 70 --

MR. WALLENSTEIN: Sure. Sure.

THE COURT: -- but how does -- what is cellular data in the formulation that you provided me, which is to say that it describes the transmission of information? It's not particularly helpful to say, Well, energy is consumed when that happens, because what the -- the cellular service provider is incrementing against a user's account is not the energy expended. It's the measurement of data that is

transmitted or sent or received to the phone.

MR. WALLENSTEIN: Well --

THE COURT: So, how -- how is that helpful to, you know, point out to me that it consumes energy?

MR. WALLENSTEIN: Well, one of the things actually, your Honor, I submit that actually is bundled into the price that users pay when they are buying cellular data is the energy that's expended when data is transmitted, as well as the cost of maintaining the network, maintaining the length of pipe that you have, the amount of bandwidth. All of those things, like any product, get rolled up into the price of the product.

So, your question, what is cellular data, well, it's what you buy when you pay your $29.99 every month. And what that is is a -- a requirements contract if you're on an unlimited plan and a particular increment of data if you're not, and some people do have prepaid cards where they're buying 25 gigs of data or they -- they're paying $14.99 for every incremental gigabyte in addition. They are buying the -- the data that they will use over the course of that month.

Once -- I -- I acknowledge that it has to be metered to know which data it is. But, just like the analogy your Honor used to apples in -- and the prior round of briefing and the prior oral argument, a farmer --

THE COURT: I'm known for analogies.

MR. WALLENSTEIN: A farmer can purchase a requirements contract for all the apples the farmer can consume. I would submit the farmer owned -- if a farmer can consume a thousand apples that month, the farmer owns a thousand applies. We don't know which apples they are because the apple manufacturer has a million apples. They don't become the particular apples until they're actually put in the truck and delivered to the farmer. But he stills owns a thousand apples if that's what he can consume. And, by the way, if he bought a thousand apples specifically, not a requirements contract but a number, then he definitely owns a thousand apples. That's what he paid for.

THE COURT: Right. But -- but your description of either the unlimited plan or the more limited plan, you know, the fixed price amount or the cart, is entirely consistent with a description of cellular data or cellular data allowance as a contractual right to a service, access to a network, which is exactly how I described it before.

So, it -- here -- here's the -- here's the difficulty that I am struggling with still or again, which is it does seem that there is a question of what do the Plaintiffs own or exclusively possess in this contract. And one thing that can be said is that they have a contractual right to use a particular or unlimited quantum access to the network, and

it will be measured in these bytes of data. But it does appear to be completely defined by the contract. And it's -- it's difficult for me to understand what you exactly mean in the context of a conversion claim to say, as you do at I think it's paragraph 65, the Plaintiffs possess and control their cellular data. Like, what does that mean? Cellular data is not any plaintiff's cellular data until they use it in this context. There's not a thing. It's a right to use it. But, until you actually use it to send or receive -- you meaning Plaintiff -- there doesn't seem to be any notion of exclusive possession or control. It's just out there in the network.

MR. WALLENSTEIN: Your Honor, I -- I hear what you're grappling with, but the answer is electricity. That's equally true of electricity. When I have my contract with my utility company for all the requirements, a requirements contract for all the electricity that I can use, I don't own any particular electrons. They're all just out there in the network. But once they enter my home and pass through the meter, the become my electrons. Those specific electrons are mine.

THE COURT: Right. So, but then there's no conversion of anything until someone uses your electrons, to put it that way.

MR. WALLENSTEIN: Correct.

THE COURT: But they're not yours. So, here, if I take my analogy to the plain old telephone network, Mr. Somvichian says, Well, if somebody's using your telephone service, tapping into your phone line, they are not converting anything. They are interfering with your contractual rights.

Why not the same here? It's not necessarily a foregone conclusion that your electricity thesis works. I have been using it as a useful analogy, but I think that your 1905 and 1929 California Appellate Court decisions are not, you know, totally compelling, for the reasons that the Court was not considering this issue in the context of a conversion claim but more in the context of contractual rights. You did use the word "personal property" I grant you.

So -- so, anyway, that -- that's the -- let me -- let me formulate it a slightly different way, and then I'll let you actually have -- get a word in edgewise here, which is it seems like if the problem is focusing on the exclusive possession or control or ownership, there is no such thing happening by a Plaintiff with respect to what you are calling cellular data if I think of it as a physical phenomenon, a bite of something. There -- there's nothing that is owned that is separate and apart from the use per contract to send and receive information.

MR. WALLENSTEIN: I acknowledge that, your Honor.

You don't own it until you use it. And I submit that's the same as electricity. Your Honor may disagree. We understand that your Honor disagreed from your last decision, and -- and that's why we repled the complaint the way we did.

Your question about phone service is, I think, very apt. I'd direct you to the Precision Pay case which specifically deals with phone service and shows that phone service is susceptible to a quantum meruit claim. So, Precision Pay is a case that's kind of cursorily responded to by Google. They -- they kind of selectively quote one of the sentences in the case to make it seem like it says something it doesn't really say.

What Precision Pay involved is a pay phone owner. And the pay phone owner got paid two ways. One way was a coin getting put in the phone. He gets a piece of the coin. The other way was interexchange businesses like Quest pay a share of the fees that their customers pay them. So, you call -- you pick up the phone, you dial a number, you use that interexchange company to connect your call, and you're a customer of that interexchange company. Well, if you use a particular pay phone, the interexchange company has a deal usually with the pay phone operator to pay them a fee for the use of the phone.

In this case, Quest got around that. So, Quest users

would dial an 800 number. So, there'd be no charge to the pay phone owner. It's called a dial-around system.

THE COURT: Um-hmm.

MR. WALLENSTEIN: And Quest -- Quest customers paid Quest. Quest used its dial-around system to connect the customers' phone calls. But the pay phone owner didn't -- didn't get anything. And that case shows that there is a quantum meruit claim when no one --

THE COURT: But not a conversion claim.

MR. WALLENSTEIN: But not a conversion claim. That case shows that there is a quantum meruit claim when there's no -- I realize I'm pivoting, but your --

THE COURT: Yes.

MR. WALLENSTEIN: -- analogy is -- your analogy is so apt I couldn't resist.

THE COURT: Okay.

MR. WALLENSTEIN: And, as you see, when we replead the complaint, we understand your skepticism about the conversion claim, and what we are squarely going for is the -- if you view it as a service, we think quantum meruit aptly states a claim.

So, what Precision Pay says is that when you -- even though there's not an expectation of payment, there's still a quantum meruit claim. And Google would have you believe that Precision Pay says there has to be an affirmative

expectation of payment. But that's not what the case says. The case says all that has to be the case is that the Plaintiff didn't intend whatever the subject of the quantum meruit is, the pay phone calls, to be gratuitous. And there's a huge difference between an affirmative obligation on the Plaintiff to prove that there's an expectation of compensation on the one hand and the -- proving the absence of an intent of gratuitousness.

So, all the case law quotes this one sentence that says there's an expectation of payment but the expectation is only that the service wasn't intended to be gratuitous. And a lot of it is taken out of context. And I'll let your Honor read the cases and see what is and isn't dicta, and the parties have lots of dispute in the briefing about what cases say and whether it's relevant to the holding.

I would urge you to be -- to look into that and be careful about that. But, basically, what Precision Pay says is that the only requirement is that the services rendered must not have been intended to be gratuitous, and there's not any requirement there must be an affirmative expectation of compensation. And that's with respect to pay phone service specifically.

It also says that the claim applies especially where the Defendant acquires the benefit with knowledge -- with knowledge of the circumstances establishing the unjust

enrichment. So, based -- just like the pay phone owners had no idea that Quest was causing pay phone users to free ride off of the pay phone owner's pay phones here, Plaintiff in this case had no idea that Google was free riding on their cellular data. The case is on all fours with our case. It resolves any Article 3 standing issues that it may have. And it's important because it's the only case where nobody, not the Defendant, not a third party, had any expectation of payment for the services at issue because Quest had no relationship with the pay phone operator whatsoever, yet there was still a quantum meruit claim.

THE COURT: Okay. So, I -- I am interested in the quantum meruit claim. But, just before we leave the converging claim, I did have one other question, because I --

MR. WALLENSTEIN: Sure.

THE COURT: -- noticed that you added a Plaintiff who has a fixed-price plan or a -- you know, for a certain number of gigabytes and then they have to pay more if they exceed that. But what I didn't see and the opposition didn't really respond on this point is an allegation that any of the Plaintiffs, including that new one, actually suffered an injury because of that arrangement.

So, in other words, did any Plaintiff have to pay more for data or suffer some degradation in service because of

the -- I'm going to call it free riding, the free riding that you allege Google did on the data plan that that subscriber had?

MR. WALLENSTEIN: It's a great question, your Honor. And the answer is we didn't allege it because you don't know. So, when Plaintiff Nelson is her -- Jennifer Nelson is her name. When Plaintiff Nelson uses her cellular phone, she doesn't know what's causing her to exceed the one-gigabyte threshold, just like someone on a unlimited plan doesn't know that they've been throttled. You don't -- if you -- this is an important point, and it's related to the point you made if you'd just -- if you'd let me -- if you'd let me make it, your Honor, even though it's not squarely responsive.

All -- this is something that I know your Honor understands, but I don't know if you fully grasped the import last time around. Unlimited plans are not unlimited. They are 20-gigabyte or 25-gigabyte plans. Once you hit that cap, which is in the fine print, your connection slows down. On some services you can't use video. On others you can. Your service is degraded. That makes each increment of that 20 gigabytes that you've purchased precious to you. And when Google uses any increment of it, it is using -- it is converting your valuable property.

THE COURT: But that -- that actually doesn't make -- like, if I -- if I say I have a not infinite but so big quantum of, you know, available access to the network, 25 gigabytes -- I don't know if that's it, but whatever it is, I'm like never going to get there if I'm a normal subscriber. Then there really isn't an injury is the -- is the Defendant's point. You -- I would expect that any plaintiff would know if it suffered a degradation in service. You could tell if your video got throttled. You could tell if you couldn't actually use video on a particular service. There would be -- you would experience an injury. Otherwise, what's the point of filing a lawsuit.

On the question of do you know if you've exceeded the threshold, if you're someone like Ms. Nelson, because of whatever Google is doing with data transfer, you might not know which actual transmission or reception of information put you over the -- the hump, but you would know based on your information about how much on average is being used by Google independent -- allegedly independent of active use. And you could say in this month or whatever it is, we exceeded the -- she exceeded the threshold by this increment which, look, it matches what we have itemized as the level -- I mean, you gave me all kinds of information about how much Google is taxing the use of -- of the service.

So, you ought to be able to at least say, well, you

know, but for that, she would have been within her threshold, and I don't see those allegations.

MR. WALLENSTEIN: Your Honor, respectfully, I disagree with that as a matter of fact.

THE COURT: And why is -- why is that?

MR. WALLENSTEIN: So, the complaint alleges that Plaintiffs don't know when they're being throttled. That is an allegation in the complaint, and it is actually true. The --

THE COURT: Then why does it matter?

MR. WALLENSTEIN: -- providers -- the providers -- because, so, take for -- take a wage and hour case. If an employer doesn't keep records of time sheets, that doesn't mean you can't recover against them, in the -- in the same way --

THE COURT: But you know if you've worked -- as an employee, you know if you've worked for hours for which you haven't been paid. That's how much cases are litigated. So you should be able to say -- I'm sorry that I find this just kind of remarkable, but you should be able to say as a user, I was trying to watch this video, and it kept, you know, stalling, and I couldn't get it and, you know, my service was degraded.

MR. WALLENSTEIN: Our allegation --

THE COURT: If nothing happens, why do you have an

injury?

MR. WALLENSTEIN: But, so, a typical user may experience a degradation in service not because of throttling, at any point in the month. Sometimes you have bad service. The allegation in the complaint is that users -- and this is true for me personally. I don't know whether I've been throttled or whether I just have bad service in a given month, if it's at the end of the month and I've had a -- you know, maybe a little more usage than normal.

THE COURT: Okay.

MR. WALLENSTEIN: We've alleged in the complaint that the users don't actually know, and they don't. You just use your phone. You don't get a notice. You could -- you could get a notice from Google that you're being throttled, but they don't tell you that. So, users don't know when they've been throttled and when they haven't.

And, to your point about the quantum of data that's used, so Plaintiff Nelson buys by the gigabyte. Our allegation I believe in the complaint is that the log file piece of the case at least is about eight megabytes a day. So, why we think that's very significant and it's a very important injury, relative to the total usage of a user in -- over the course of a month, it's pretty small. So, it's actually impossible to let you know whether that increment is what put you over the top or didn't. If your use in a

particular month was eight megabytes more than a gigabyte, well -- well, those eight megabytes might have been from watching a video. If your usage was nearly two gigabytes, there could be eight megabytes in there that mattered. You just -- you don't know because it's all one pot. It's not divided up.

THE COURT: Right. I guess what I was thinking of -- and possibly this is not the right way to think about it -- is a sort of but-for theory. So, but for Google's activities, you wouldn't have to pay for the extra gigabyte.

MR. WALLENSTEIN: And in -- we submit in some cases that's true, but we don't know which ones they are.

THE COURT: Okay.

MR. WALLENSTEIN: And it's because of the way Google does it. If they told us that you were throttled, we'd know.

THE COURT: Okay. So, let's get to quantum meruit.

MR. WALLENSTEIN: Yes, your Honor. Thank you.

THE COURT: Well, I do -- I -- I take your point about Precision Pay, but it seems to me that the Ninth Circuit case we should be looking at is In Re De Laurentiis (phonetic).

MR. WALLENSTEIN: And Precision Pay quotes and interprets In Re Delaurentiis.

THE COURT: Yes. And, with all due respect to Judge Chen, I mean, you know, I'm not sure that he modifies anything from -- or intended to modify anything from In Re De Laurentiis. It -- it does seem to make clear -- the Ninth Circuit does seem to make clear that expectation of payment from someone is a necessary element of a claim for quantum meruit. But I think that -- that really, conceptually, quantum meruit is intended to encompass a situation where both parties believed that one was doing something for the benefit of the other, both parties to the litigation in the absence of a contract -- or at least an enforceable contract, and -- and here, what I struggle with is the idea that the Plaintiffs are performing a service. I mean, I'm sensitive to Google's observation that this doesn't really seem to fit a quantum meruit theory. It -- if anyone's providing a service, it's the -- it is the cellular service company. They're the ones providing the service, literally providing the service. And your argument is, Well, the Plaintiff shouldn't have to pay for that. But it doesn't seem to fit a quantum meruit theory.

MR. WALLENSTEIN: Well, your Honor, to that point -- and I will respond on In Re De Laurentiis. But on that point, I'd direct you to Wonderful Citrus. So, in Wonderful Citrus, the person providing the service is a contract laborer. And Wonderful Citrus bought their labor. So, just

like the Plaintiffs buy cellular data from cellular carriers and they now have the claim if their cellular data is coopted the way Google has, when Jordan coopted the labor of the laborers and didn't have to pay Wonderful Citrus for the labor that he -- laborers that he had laboring on his own farm, by -- by Wonderful Citrus purchasing the labor from the contract workers, it's their right to enforce.

Another analogy might be, you know, if I buy a gift certificate to get a haircut and someone else goes and uses it, it's not the hairdresser who has a cause of action against them. He got paid for the -- for the gift certificate. It's me.

THE COURT: But the -- okay. But the expectation of -- somebody expects to be paid by somebody is the -- is the notion. Whether it's the actual Defendant or not, there is an expectation of payment. So, you know, certainly, in the -- in the case that you all like to fight about about whether, you know, whether it was DEG or CTI or NBC, you know, NBC expected to be paid by somebody on behalf of DEG, like that kind of a situation. So, it's not literally -- it doesn't necessarily literally have to be the Defendant in the case is the one from whom payment was expected. But there has to have been an expectation of payment for services rendered for the benefit of. That's the -- that's the notion.

And, so -- so, here that -- when I make the observation, that doesn't seem to fit. It doesn't seem that anybody had an expectation of being paid for whatever Google was doing. The -- more particularly, the Plaintiffs didn't have an expectation of being paid. Now, you say, Well, they didn't know they were being harmed. But that's not quite the same thing as there was a benefit given for which the Plaintiffs expected to, you know, receive compensation.

MR. WALLENSTEIN: So, your Honor, Google's theory taken to its logical conclusion that there must always be an affirmative proof of expectation of payment, means that you could never have a quantum meruit claim where something's stolen or where there's fraud, and that's not the --

THE COURT: Well, there are different theories of recovery. So, this is where I -- I really come down to the -- to a question for you that I -- that bothered me last time around, which is the Plaintiffs seem to suggest and, in fact, actually say at this point in the opposition, that if this passive data transfer doesn't constitute conversion, it has to be quantum meruit, suggesting that those are the only two possible theories of recovery. And, while that might have some, like, rhetorical impact, I'm not sure I agree, and I'm not sure that it dictates any kind of result. So, kind of in line with the argument you were just making, I'm -- I'm not sure that it means that the Plaintiffs are left

wholly without remedy. And, I mean, there are distinct -- there are different legal theories that one could invoke. You have chosen conversion or quantum meruit, but I'm not convinced that that's your only option and that I must find that there's a quantum meruit theory if I find there is not a conversion theory.

MR. WALLENSTEIN: Your Honor, we -- we chose the theories that we chose because we didn't think we could recover on other theories.

THE COURT: I see.

MR. WALLENSTEIN: That -- we may be wrong about that, and your Honor may be right, and that's not a reason to change the elements of quantum meruit.

THE COURT: Right.

MR. WALLENSTEIN: That's not what I'm saying.

THE COURT: Exactly. Okay.

MR. WALLENSTEIN: I'm just -- I'm just suggesting that with new technology, which this is, the reason why this particular fact pattern may not have arisen before is because it's a relatively new technology, and it's a new development, and it's difficult to analogize to things that have happened in the past.

Normally, everybody knows what's going on, and there's a -- you know, a service that's human labor or something like that. And, you know, maybe you didn't have a contract

with a price term, but you figure out what it's generally worth.

Technology is very different than where we were back when these rules were first set.

So, let me talk about De Laurentiis because, you know, you opened with that; and everyone thinks -- everyone understands that it's the -- the Ninth Circuit case at issue here.

THE COURT: Okay.

MR. WALLENSTEIN: So, De Laurentiis does not say that there must be an expectation of payment from someone. It says that there is no expectation of payment requirement from the Defendant. That there may have happened to be an expectation of payment from the intermediary company, the third party in De Laurentiis, does not mean that such an expectation was required as a matter of law.

Regardless, even if you disagree with that, the only expectation that's required is set forth in the next sentence of the decision, that compensation must be expected only in the sense that the service rendered must not have been intended to be gratuitous. That's a very important sentence.

The Defendants, like I said, are trying to conflate two things, an affirmative expectation of payment on the one hand, which only makes sense if you actually know about the

-- the problem, unlike in this case, and an absence of gratuitousness on the other.

The former is not an element of quantum meruit, we submit, for all the reasons in our brief. The latter, the absence of gratuitousness, is at best an affirmative defense. And we'll talk about that in a moment, but even if the latter -- the non-gratuitousness, is an element, which it is absolutely not the four corners of the complaint make clear that Plaintiffs did not intend to gratuitously allow Defendants to utilize their cellular data.

THE COURT: What service did the Plaintiffs provide? The Plaintiffs do have to provide a service for which they are expecting compensation. What is the service that Plaintiffs provided?

MR. WALLENSTEIN: The service is Google coopting -- so, if cellular data is the right of access to the network, right -- that's the premise of the quantum meruit claim -- Google is coopting that right of access, and that states a claim for quantum meruit.

THE COURT: But Plaintiffs did not provide a service. So, if I'm focusing, again, on the language that you're highlighting for me in De Laurentiis, what service did Plaintiffs provide for which they are entitled to a benefit?

I don't see a service that the Plaintiffs are providing.

MR. WALLENSTEIN: The services rendered are the cellular data. The right of access --

THE COURT: It's not theirs to provide. It's not theirs to provide. That's the --

MR. WALLENSTEIN: But they --

THE COURT: that's the problem that I have.

MR. WALLENSTEIN: But they purchase it, your Honor. By purchasing it, it becomes their right to enforce. The cellular company's already been paid for the data. It's not going to sue Google. It's already been paid for all the cellular data that's used.

THE COURT: Right.

MR. WALLENSTEIN: The Plaintiffs purchased that cellular data from the carriers, just like Wonderful Citrus purchased the labor from the contractors, and it becomes the Plaintiffs' right to enforce.

THE COURT: Okay.

MR. WALLENSTEIN: If you -- if you put the onus on the provider, then Google will simply free ride. There'll be no one left to enforce.

Now, Google says that subsequent Ninth Circuit -- excuse me -- subsequent -- let me make one additional point on De Laurentiis.

THE COURT: Sure.

MR. WALLENSTEIN: The law presumes that services

are gratuitousness -- excuse me -- gratuitous only under very specific circumstances, like if you are cohabitating, if you are married, if you are close relatives. That's the Maglica, the Maglica case, as well as McBride.

Google drops that aspect of the argument completely. The relationship between the Plaintiffs and Google is nowhere -- nothing like relatives or cohabitants. You don't presume gratuitousness, and you can't intend something to be gratuitous if you don't even know it's happening.

The allegations in the complaint clearly plead the Plaintiffs had no idea Google was doing this. Why didn't they know? Because Google didn't tell anyone. They didn't write in their disclosures, "By the way, whenever you walk around and your phone's in your pocket, whenever you get in a car, we are going to send 300 log files that don't -- that don't affect the functioning of your phone, and we're going to do it over cellular data even though we could do it over WIFI. And, by the way, those cellular transmissions, they're going to be credited to you against your account, and if you have a fixed data plan, you're going to have paid money for them. If you have an unlimited data plan, you're going to have less data available before you get throttled."

Google didn't tell anyone that. And if --

THE COURT: Well, I know you all dispute that. But, taking your allegations of the complaint, I understand

that's the theory -- that's the theory that you're advocated. So, why isn't it a breach of contract?

MR. WALLENSTEIN: Because the contract -- why isn't it a breach of contract?

THE COURT: Yeah. So --

MR. WALLENSTEIN: Well --

THE COURT: So, when you're telling me all these things and there's this whole consent dispute that's based on the terms of service, why isn't what you just told me just a straight up breach of contract claim between the Plaintiffs and Google?

MR. WALLENSTEIN: Because the Plaintiffs didn't contract with Google for cellular data.

THE COURT: No. They contracted --

MR. WALLENSTEIN: They contracted with the carriers.

THE COURT: -- with Google or the -- the only incidental beneficial uses -- there is something about, you know, data transmission in there. You all dispute about what that encompasses, but it seems t me that if what you say is -- what you said just now is true, then the Plaintiffs have a breach of contract claim against Google for violating those terms of service.

MR. WALLENSTEIN: So, the same reason it states a quantum meruit claim and not a breach of contract claim, you

can't have both. When there's a valid contract, you don't have quantum meruit. That's the law. And the reason for that is when the parties' understanding regarding a particular topic, regarding compensation, is reduced to writing, the writing controls.

The whole point of the consent argument is that the contract does not address the issue at hand. The contract between the Plaintiffs and Google does not address how much Google's supposed to pay if it's using Plaintiffs' cellular data. If it -- it doesn't even disclose that Google is using their cellular data under the circumstances alleged here. If it did that cleanly and squarely, maybe it would be a breach of contract claim. But, because it doesn't do that, there isn't a breach of contract claim; and, in our view, the only other option if it is a service is quantum meruit and not some other cause of action.

THE COURT: And I did -- I know I did interrupt you. So, I'm sorry to have derailed your argument.

MR. WALLENSTEIN: No.

THE COURT: But please continue on the --

MR. WALLENSTEIN: Oral argument is your time, your Honor. I want to answer the questions you have.

So, they cite Huskinson --

THE COURT: Yes.

MR. WALLENSTEIN: -- a Supreme Court of California

case that they point out occurs after De Laurentiis. Huskinson involved two law firms that agreed to share fees, and there was no expectation of payment that was at issue. Everyone agreed that the client and the law firms understood the law firms would be compensated for the services they provided. The issue was just the law firms didn't show their fee sharing agreement to the -- they didn't get written sign-off from the client. So, it was legally unenforceable, and the main law firm didn't pay the other law firm and got sued.

So, because there was no expectation of payment issue, the statement that Google quotes from Huskinson is dicta. It has nothing to do with whether that's an element or not because whether it's an element or not -- because whether it existed or not wasn't at issue.

Huskinson does not overrule De Laurentiis. It doesn't even cite De Laurentiis. It has absolutely nothing to do with it.

The other case that Google cites is Chavez v. Hayward, which is a District Court case that interprets De Laurentiis differently than we do. And, just like they have, you know, a District Court that goes their way, we've got -- we've got one that goes our way. And I, you know, trust your Honor to read them and you'll make your own decision about which one is correct. But I would draw your attention to the fact

that in Chavez the case was dismissed because there really wasn't any benefit. This is the case involving a batterer.

THE COURT: Okay.

MR. WALLENSTEIN: And the police were called and --

THE COURT: (Indiscernible).

MR. WALLENSTEIN: -- they arrest -- they arrested him and they arrested him, and his arm got hurt, and they sued the batterer for the value of the emergency response and the police response. And they said, Well, he hasn't benefitted from this, and we're dismissing it.

That didn't really have anything to do with an expectation of payment. There is a footnote that talks about and interprets De Laurentiis the way we disagree with, that we think is wrong. That's dicta. The holding is no benefit equals no quantum meruit. It doesn't have anything to do with an expectation of payment.

We've already talked about Wonderful Citrus and -- and Precision Pay, and I'd just draw your attention to the Miller case.

THE COURT: Yes.

MR. WALLENSTEIN: The Defense argues that Miller is an outlier. I think what they mean by that is they disagree with how it was decided. It's not an outlier. It's from 2008. That's after Huskinson, which is from 2004.

Miller has not been overruled. Miller relies on an old 1960 case for a longstanding principle that the Defense bears the burden of proving that the services were gratuitously rendered unless the parties are near relatives.

THE COURT: Okay.

MR. WALLENSTEIN: That --

THE COURT: Let me just pause you there. I've read Miller. I've read Sowash, and I -- I don't think that you have the better argument on this one. It -- the -- the circumstances of the recitation of the law in Miller, which includes a reference to Huskinson as well, and the understanding or expectation of both parties that compensation, therefore, was to be made. So, Miller does include that element.

When there's a discussion of, on the other hand, a defense that the work was performed under a special contract as an affirmative and goes on to say likewise, unless, the parties are near relatives, the recipient of the services has a burden to prove that the defense of services were rendered gratuitously or without obligation, citing Sowash.

The way I read Miller combined with Sowash is that in the situation where there is this kind of personal service provided that there is a presumption, as Sowash says, that unless you're a near relative, you're not doing that just for your own fund. I mean, Sowash is an extraordinary case

of some inebriated person whose friend took them in and provided for them and took care of them and then in the end, that person was saying, Hey, I need -- I didn't do this for free. I need to be compensated. And the Court said, Yeah, I'm going to presume that you should -- there was an expectation you should be compensated because you're not a near relative.

I mean, to me that, I think, is a very thin read to say, well, therefore, there's a presumption -- or there's an affirmative defense that you have to establish a gratuity and that's on the burden of the Defendant. I mean, I don't think so.

So, I think there -- what I take away from the arguments that -- and the cases that the parties have cited to me is that it's -- you know, it's maybe two sides of the same coin, not gratuitous and I expect to be paid. It's kind -- they're two sides of the same coin. And there is some statement -- and I'm not sure which case it comes up in. Maybe it was Sowash. I can't remember now -- where the -- the court remarks that to avoid some problem, you ought to plead that it's not gratuitous. You ought to have facts that suggest that it's not gratuitous in the actual Plaintiffs' complaint. So, I'm not sure how that shakes out.

But, in any event, my concern is the question I have

been trying to -- to pose is that I'm not sure that there are any services being provided by the Plaintiffs. So, I will go back and look at your -- your arguments based on Precision Pay and also Jordan v. Wonderful Citrus, but I think that the -- it doesn't -- again, it doesn't really fit the quantum meruit theory to say that the Plaintiffs provided services.

MR. WALLENSTEIN: But the Plaintiffs acquired the -- the services from -- I've made this argument several times.

THE COURT: Yeah, yes.

MR. WALLENSTEIN: You know my argument, your Honor.

THE COURT: I got your -- I got your argument. I will give it -- I will absolutely give it some consideration, thorough consideration.

MR. WALLENSTEIN: Thank you, your Honor.

THE COURT: I guarantee you I will. So, I -- and I appreciate that, and I appreciate that, you know, the -- the opposition said what it said and then I had the reply with the pile of, you know, responsive cases, and I appreciate your rebuttal here.

MR. WALLENSTEIN: And, you know, that reminds me, your Honor, regarding some of the cases cited in the reply, which you kind of referred to -- you alluded to earlier --

so these are the cases at the very end that aren't cited until the reply. The four cases that the Defense claims dismiss quantum meruit for failing to plead an expectation of compensation don't involve any concealment or theft. Everything happens out in the open, and that's -- I can go case by case if -- you know, I'm happy to talk about them case by case if you have particular questions, but that fundamentally distinguishes all of them.

If Defendants are right and -- we submit there really is a huge difference between proving the absence of something, the absence of gratuitousness and affirmatively approving an expectation of payment. Those are two completely different things. You can't intend something to be gratuitous if you don't know it's happening. That's what distinguishes all of those cases. In all of those cases, everyone knew what was happening. It was a -- often a personal service provided in the open, and if Google's theory is right, then there could never be a claim to address the wrong in this case in our review. I respect your Honor's point that there's only two causes of action pled here rather than others. We don't believe there are other viable causes of action. And, because this is a new area with, you know, a very sophisticated Defendant in this particular area operating kind of on its home turf, cases like this one will send signals to technology companies

about what they can and can't do. And I'm not saying you should decide the case for policy reasons. I'm really not.

THE COURT: Okay.

MR. WALLENSTEIN: But it does -- it does make it incumbent upon all of us, Google, the Plaintiffs, and the Court, to make sure that we don't interpret the causes of action in an inappropriately stringent way because this is a -- in our view a serious wrong that will not be righted unless one of these two causes of action applies. And, in our view, either it is a -- either it's a property right and you get Article 3 standing because you've stolen property, like, I get that there's -- it's really complicated. But, at the end of the day, if you believe it's a property right, that's where you get standing from and that's where you got the injury.

If you don't believe it's a property right, which we completely understand and we kind of repled our complaint -- I didn't expect to be talking about conversion as much as we have today. I'm heartened that you're still thinking about it, your Honor. I fear that by not talking about it as much as I have, maybe I've tanked it, but --

THE COURT: No, no, don't -- don't.

MR. WALLENSTEIN: But the reason we led with quantum meruit and the reason we briefed it the way we did is because if it's not personal -- if it's not property, the

only other thing it can be is the right of access to a service, and that's what quantum meruit is intended to address.

And, very briefly, regarding the common count issue, I think your Honor's decided it already; but I just wanted to note that both Farrington (phonetic) and McBride, both of them in my -- on my reading, involved specific counts for quantum meruit. So -- so, one of them doesn't involve any reference to common counts at all. The other one, it does involve references to common counts, but the common counts is for money it hadn't received, and it appears to me that there is a specific count for quantum meruit.

So, if you look at those cases, I think that that answers the question whether quantum meruit is necessarily a common count. It's not always. It does not have to be. It depends on how factually fleshed out and legally fleshed out the theory is.

I'd also briefly note that quantum meruit is the same thing as quasi-contract. There's a part in Google's brief where they suggest that quasi-contract seeking restitution for unjust enrichment is a separate cause of action from quantum meruit, that they are two different things. And I admit that there is at least one case that does have two counts with those names. But, when the Court addresses

those two counts, it combines them together. It says they're --

THE COURT: Yes.

MR. WALLENSTEIN: -- the same thing.

THE COURT: Yeah, I -- I don't -- I don't think we need to belabor that -- that issue, but thank you for pointing that out. Okay.

MR. WALLENSTEIN: Fair enough. Is there any other issue your Honor would like me to address within quantum meruit or conversion?

THE COURT: No. I think you've -- I've asked you all my questions. If there's anything further that you need to add to your argument, let me know. Otherwise, I'll return to Mr. Somvichian for a brief response if he wants one.

MR. WALLENSTEIN: Yeah, I'd just say the -- I'd close with Google could have told everyone that this is what it was doing. And if it had done that 10 years ago, that it's having everyone send their location at all times completely unnecessarily, taking copies of your location data whenever you check the weather so the weather -- the weather app gets a copy and then Google gets its own copy with its own separate transmission so that it could build out Google Maps and make Google Maps, you know, much better, if it had told everyone that 10 years ago, there would have

been uproar and outrage, and compensation would have been extracted for that. But it didn't tell everyone. The clauses are ambiguous. It hid that information until recently. And if -- if that -- if not telling people that you are doing that doesn't state a claim for conversion, it must state a claim for quantum meruit.

THE COURT: Okay. Thank you very much.

MR. WALLENSTEIN: Thank you, your Honor.

THE COURT: Mr. Somvichian, anything that you need to respond to?

MR. SOMVICHIAN: I would like to, your Honor. I'll try to be brief.

THE COURT: Okay.

MR. SOMVICHIAN: Four -- four quick points. On the conversion claim and the property arguments, we've heard all this before, your Honor. Mr. Wallenstein talked about the quantum of energy being consumed and then you never get it back and the bytes of data are -- are unique and also consumed so that they're not attributable to more than one device. We've heard all of that before, and I'll just give you a quick citation.

In their opposition to the prior motion to dismiss -- that's Docket Entry Number 39 at page 18 -- these arguments are elsewhere, but here's one instance where they've raised these arguments before. So, at the very bottom of the page,

they argue:

"Plaintiffs' individual bytes of cellular data are used once and exclusively by their devices. They cannot be copied and multiplied."

That sounds a lot like what we're debating again now and what Mr. Wallenstein tried to raise about quantums of energy being used once or bytes of data only being used a single time or -- or attributed to a -- a given user. Those arguments failed before, and they fail for the same reason now, your Honor, which is all of this conflates the means of transmission with what they're trying to construe as the property. And we're still struggling with that because when they say cellular data -- they used to say cellular data allowances, and now they pivot to cellular data -- what they're still talking about is the means of transmission. That's the means by which they are able to send and receive the only thing that they actually own, which is the data files at issue.

So, again, I won't belabor the point.

THE COURT: Okay.

MR. SOMVICHIAN: We've heard all this before, and the claim fails for the -- the same reasons.

On the quantum meruit claim and what is the right standard and what's the right case, on the Huskinson case,

your Honor, that is the California Supreme Court. I'll just quote it very briefly. Page 458 of that decision:

> "To recover in quantum meruit, a party must show that circumstances were such that the services were rendered under some understanding or expectation of both parties that compensation, therefore, was to be made."

So, Mr. Wallenstein says that's just dicta. That's a very clear statement of the requirements of quantum meruit by the California Supreme Court that postdates the other decisions we've been talking about. I don't --

THE COURT: What -- what about Mr. Wallenstein's point, which you perhaps are going to get to, that if you don't know, you know, you can't -- you can't meet that standard; and, yet, it would be unreasonable to -- and I'm paraphrasing Mr. Wallenstein's argument -- it would be unreasonable for someone in Google's position to expect they could just do this for free, even if unbeknownst to the Plaintiffs this was going on?

MR. SOMVICHIAN: Well, again, your Honor, that goes to the assumption, which is wrong, that this has to fit into on of these frameworks. It's either a conversion or, if it's not, it has to be quantum meruit. That's not -- that's not right. They -- they could have framed their

complaint however they wanted. And whether it was because of the remedy that they wanted to seek or whether they thought these particular causes of action were more amenable to class certification or whatever other strategic reason they chose to limit the claims to what they did, they did do that; and they limited their complaint to two different theories, neither one of which fits the facts that we have here. And the fact that we're grappling with all of these different elements and whether they fit really reinforces that we're -- we really got -- have a square peg round hole situation. And just because it doesn't fit the two is not a reason to change any of the elements that have to be applied. And this idea that if -- if you don't do that, if you don't jam it into one or the other, there's going to be this great injustice, that's a result of the way that they pled their complaint, your Honor.

And, but the last point, when you asked about the -- the named Plaintiffs and their allegations with respect to whether they were harmed in any way, they weren't. Their allegation doesn't say they were. And, just to -- just to reinforce this, that is a separate and independent basis to dismiss both of these claims. Even if, your Honor, you found that there's a personal property interest at issue in the cellular data and clear that hurdle, even though the complaint, we submit, is no different than before, the fact

that the named Plaintiffs haven't alleged any interference with their ability to use their cellular data allowances is another separate and independent basis to dismiss their conversion claim. It's also a basis to dismiss the -- t he quantum meruit claim because the entire premise of quantum meruit is that there has been some detrimental reliance and a need to compensate the Plaintiffs for some amount that they've incurred to provide the service or for some detriment that they've suffered in expectation of compensation. And, again, there are no allegations to support that here. So, that -- that failure would be an independent basis even if you got past property interests ons the conversion side and expectation on the quantum meruit side.

THE COURT: Okay. Thank you very much.

Let me -- let me thank both parties for very helpful arguments this time as last time. I have followup to the question I asked at the end of last time's hearing, which is what is going on in the State Court and is that anything that might be useful for me to know? I -- I don't recall, Mr. Somvichian, are you representing Google in --

MR. SOMVICHIAN: Yes. Yes, your Honor. And Mr. Wallenstein --

THE COURT: Also --

MR. SOMVICHIAN: -- also for the Plaintiffs in the

Chupo (phonetic) case. We've been meeting and conferring at least weekly, if not more often than that, on various discovery issues, but there's no material update.

THE COURT: Nothing's happened?

MR. SOMVICHIAN: No.

THE COURT: The case is still proceeding through discovery and --

MR. SOMVICHIAN: Yes.

THE COURT: Okay. All right.

MR. WALLENSTEIN: Your Honor, I --

THE COURT: Yeah, Mr. Wallenstein?

MR. WALLENSTEIN: I speak to Mr. Somvichian more than some members of my family.

THE COURT: Well, I'm glad you hopefully both get along. That's important.

MR. WALLENSTEIN: That's why we're repleading the complaint, your Honor. We're having so much fun together in the State Court. We would just love to continue that here.

THE COURT: I see. Okay. All right. Well, thank you very much for the update on that. I do appreciate it. I will issue a written decision, and then we'll figure out what to do from there. Okay.

MR. WALLENSTEIN: Thank you, your Honor.

THE COURT: All right. Thank you.

MR. SOMVICHIAN: Thank you, your Honor.

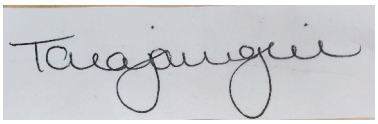
THE COURT: This matter is concluded.

(Proceedings adjourned at 11:20 a.m.)

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.



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